

JUL 12 1995

Recording Requested By:

~~JUL 6 1995~~

TBG, Inc.

When Recorded Please Return To:

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SONOMA COUNTY

TBG, Inc.  
565 Fifth Avenue  
New York, New York 10017  
Attn: General Counsel

95-55957

COVENANT AND AGREEMENT  
TO RESTRICT USE OF CERTAIN PROPERTY

RECEIVED  
MOB&E

JUL 17 1995

Ans. \_\_\_\_\_

This Covenant and Agreement To Restrict Use of Certain Property ("Covenant") is made as of the first day of June, 1995 by TBG, Inc., ("Covenantor"), which is the owner of certain real property situated in the City of Cloverdale, County of Sonoma, State of California, as more fully described in Paragraph 1.7 of this Covenant (the "Property") for the benefit of the California Department of Toxics Substances Control, as defined in Paragraph 1.1, ("DTSC"), with reference to the following facts:

#### RECITALS

A. The Property is a portion of the site of a casting plant which has been in operation from 1965 to the present on which industrial waste was disposed.

B. The Property has been the subject of investigation by the Covenantor, in response to requests of the United States Environmental Protection Agency ("EPA"), DTSC, and the Regional Water Quality Control Board (the "Regional Board") to determine the nature and extent of hazardous substances located on the Property and whether the hazardous substances identified present any significant existing or potential hazard to present or future public health or safety. Polychlorinated biphenyls ("PCBs") have been known to be present in soils on the Property. Certain volatile organic compounds ("VOCs") have been known to be present in soil and groundwater on certain adjacent parcels east of the Property.

C. Covenantor has completed the investigation and has undertaken certain corrective measures to the satisfaction of EPA, EPA has since determined, based on information available to EPA, that the Property does not present any significant existing or potential hazard to present or future public health or safety provided that certain precautions as set forth herein are taken in connection with any excavation.

## ARTICLE I

### DEFINITIONS

- 1.1 DTSC "DTSC" shall mean the California Department of Toxic Substances Control and shall include its successor agencies, if any,
- 1.2 IMPROVEMENTS "Improvements" shall mean all buildings, roads, driveways, landscaping, and paved parking areas, constructed or placed upon any portion of the Property but shall not include any building interior improvements.
- 1.3 OCCUPANT "Occupant" shall mean any holder of a leasehold interest in all or any portion of land comprising the Property, which entitles the interest holder to the exclusive right to occupy all or any portion of the Property. "Occupant" shall not include a holder of a security interest in the Property.
- 1.4 OWNER "Owner" shall mean the Covenantor or its successors in interest, including heirs, and assigns, who hold fee title to all or any portion of the Property.
- 1.5 EXCAVATION "Excavation" shall mean the excavation of more than 1 cubic yard of earth from a depth greater than 15' below ground surface on the Property, except that soil borings performed for purposes of collecting soil data and geophysical information shall not be deemed to constitute "Excavation" so long as regardless of the total number of borings, only one boring is made per Restricted Area, and the volume of soil produced by any one such boring in a Restricted Area does not exceed one cubic yard of earth from a depth greater than 15' below ground surface.
- 1.6 EXCESS MATERIAL "Excess Material" shall mean any soil and/or bedrock excavated in the course of an Excavation which cannot be used as fill or berm material on the Property.
- 1.7 PROPERTY The Property consists of the land designated as Assessor's Parcel No. 45 in the Assessor's Map Book No. 117, Page 40, filed in the office of the County Recorder of the County of Sonoma, State of California, but shall not include any buildings now existing on or to be constructed on the land.

1.8 RESTRICTED AREAS "Restricted Areas" shall mean the areas of Parcel No. 45 identified by the following survey coordinates:

GRID NUMBER	<u>California Grid Coordinates</u>	
	NORTHING	EASTING
52358	1711697	408111
59770	1711832	407998
59835	1711824	408007
59900	1717816	408016
72379	1711806	408008
73028	1711713	408092
77317	1711687	408103
81674	1711681	408147
84987	1711771	408010
85053	1711772	408027
85054	1711781	408036

As so defined, Restricted areas are subject to this Covenant and Agreement to Restrict Use of Certain Property, to be recorded in the Official Records of the County of Sonoma, State of California.

## ARTICLE II

### EFFECT OF COVENANT

2.1 Restrictions to Run with the Land. This Covenant sets forth, for the mutual benefit of the Property, the Owners and Occupants thereof, the People of the State of California, and DTSC, protective provisions, covenants, restrictions, and conditions (collectively referred to as the "Restrictions"), upon and subject to which the Restricted Areas and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. Each and all of the Restrictions shall run with the land, shall inure to the benefit of, and pass with the Property, and shall apply to and bind the respective successors in interest thereof. Each and all of the Restrictions are imposed upon the Restricted Areas as mutual equitable servitudes in favor of the Property and every portion thereof. Each and all of the Restrictions are imposed pursuant to California Health and Safety Code § 25222.1 and shall be recorded by Covenantor pursuant to California Health and Safety Code § 25230(a)(1). Each and all of the Restrictions shall run with the land pursuant to §§ 25222.1 and 25230(a)(1). Each and all of the Restrictions are enforceable by DTSC.

2.2 Concurrence of Owners Presumed. All Owners and Occupants of all or any portion of the Property shall be deemed by their purchase, lease, or possession of such Property, to have knowledge of, and be in accord with, the foregoing and to agree for and among themselves, their heirs, successors, and assignees, and the agents and employees, of such Owners, Occupants, heirs, successors, and assignees, that the Restrictions as herein set forth must be adhered to for the benefit of future Owners and Occupants and that their interest in the Property shall be subject to the Restrictions contained herein.

2.3 Incorporation Into Deeds and Leases. The Restrictions contained herein, including, but not limited to, the provisions regarding DTSC's authority to enforce the Covenant, shall be incorporated by reference in each and every deed and lease of all or any portion of the Property.

## ARTICLE III

### DEVELOPMENT, USE AND CONVEYANCE OF THE PROPERTY

3.1 Restrictions on Use. Covenantor promises to restrict the use of the Property as follows:

3.1.1 The Owner or Occupant shall not conduct any Excavation in the Restricted Areas except under the conditions set forth in paragraph 3.1.2

3.1.2 In the event any Excavation is proposed to occur in any one or more of the Restricted Areas, or any portion thereof, the Owner or Occupant of said Property shall:

A. Notify DTSC of such proposed Excavation thirty (30) days prior to the commencement of such Excavation;

B. Direct any contractor or subcontractor engaged in such Excavation activities to comply with applicable requirements of OSHA, Cal/OSHA, this Covenant, the Bay Area Air Quality Management District and the State Water Resources Control Board, including developing a Health and Safety Plan that assumes the existence of PCBs at levels greater than 10 ppm in the Restricted Areas.

C. Utilize appropriate procedures to control dust during any period of such Excavation in the Restricted Areas;

D. Determine, by appropriate testing as approved by DTSC, whether any soil and/or bedrock encountered in the Excavation contains PCBs at concentrations above 10 ppm or VOCs at concentrations greater than 5 ppm TCE, 8 ppm 1,2 DCE, 0.53 ppm Benzene, or 0.03 ppm Vinyl Chloride;

E. If, at the time of the proposed Excavation, the Property is zoned for commercial, industrial or agricultural use, fully comply with clean-up levels and requirements, as determined and approved by DTSC, that correspond to the existing and potential uses of the Property that are consistent with zoning classifications for the Property.

F. If, at the time of the proposed Excavation, the Property is zoned for residential use, then, for soils and/or bedrock containing concentrations of PCBs above 10 ppm, or VOCs at concentrations greater than 5 ppm TCE, 8 ppm 1,2 DCE, 0.53 ppm Benzene, or 0.03 ppm Vinyl Chloride, fully comply with the following:

1. Excavate and remove from the Property soils and/or bedrock containing PCBs at concentrations greater than 10 ppm or VOCs at

concentrations greater than 5 ppm TCE, 8 ppm 1,2 DCE, 0.53 ppm Benzene, or 0.03 ppm Vinyl Chloride at a depth below 15' to a depth that would (i) permit 3 feet of clean soil or (ii) permit installation of a six inch layer of concrete, above any soil and/or bedrock containing such concentration levels throughout the entire Restricted Area involved in such excavation. (For example, if the depth desired for Excavation is 20', and PCB concentrations above 10 ppm are detected at 20 feet, then the excavation shall be completed at 23' and shall be filled with clean soil, or the excavation shall be completed at a depth beneath 20' sufficient to allow for the installation of a 6 inch concrete floor above the exposed PCB concentrations exceeding 10 ppm.)

2. Dispose of excavated soils and/or bedrock with PCB or VOC concentrations greater than the respective concentrations specified in subparagraph F.1 hereof, in an appropriate off-site facility in compliance with Section 121(d)(3) of CERCLA; and with Title 22, California Code of Regulations, Section 66260 et seq.

3. Consolidate those soils and/or bedrock which have not been disposed of off-site and which contain PCBs at concentrations equal to or less than 10 ppm but more than 1 ppm, in the Excavation area on the Property; and

4. Dispose of contaminated equipment and material which does not meet the cleanup levels set forth in 40 C.F.R. § 761.125, in an appropriate off-site facility in compliance with Section 121(d)(3) of CERCLA; and 22 Cal. Code Reg. § 66260 et seq.

5. Perform Verification sampling to ensure that the requirements specified in subparagraph F.1 above have been met.

3.1.3 During the course of, and in connection with, any Excavation in a Restricted Area on the Property, the Department shall have access to the Property for inspection, surveillance and monitoring of the Excavation, as deemed necessary by the Department in order to protect the public health and safety.

3.2 CONVEYANCE OF THE PROPERTY Within 30 days after the closing of any sale, lease, or other conveyance of all or any portion of the Property, the former Owner (in the case of a sale) or Occupant (in the case of a lease) and the then current Owner or Occupant of the Property, or part thereof, conveyed shall provide written notice to DTSC of the name and address of all the then Owners and/or Occupants of the Property, or part thereof, conveyed. DTSC shall not, by reason of the Covenant, have authority to approve, disapprove, or otherwise affect any sale, lease, or other conveyance of the Property except as otherwise provided by law or as expressly provided by this Covenant.

### 3.3 ENFORCEMENT

3.3.1 Failure of any Owner or Occupant to comply with any of the requirements set forth in Paragraph 3.1 above, shall be grounds for DTSC, by reason of the Covenant, to require the Owner or Occupant to discontinue any use of the Property in violation of Paragraph 3.1 above. Failure to observe the Restrictions set forth in Paragraph 3.1 shall be grounds for DTSC to pursue any remedy provided by law to enforce the provisions of Paragraph 3.1. Any costs reasonably and necessarily incurred by DTSC to enforce the provisions of Paragraph 3.1 shall be recoverable from the Owner or the Occupant of the Property determined in the final disposition of the enforcement action to have failed to observe the Restrictions.

3.3.3 Covenantor shall have no obligation to enforce or to police the observance of the Restrictions set forth herein by any subsequent Owner of all or any part of the Property or by any Occupant of all or any part of the Property owned by a person other than Covenantor. This Covenant shall not create any private right of action against Covenantor or any other Owner or Occupant of the Property or any portion thereof.

3.3.4 Notice of Default. The Department shall give the Owner and Occupant (if any) notice of any breach of this Covenant and Agreement and a reasonable opportunity to cure such breach prior to the Department's exercise of any of its enforcement remedies.



## ARTICLE IV

### VARIANCE TERMINATION AND AMENDMENT

4.1 Variance Any Owner, or with the Owner's written consent, which shall not be unreasonably withheld, any Occupant, of the Property or any portion thereof, may apply to DTSC for a written variance from the provisions of this Covenant. Such application shall be made in accordance with Section 25233 of the California Health and Safety Code.

4.2 Termination Any Owner, or with the Owner's written consent, which shall not be unreasonably withheld, any Occupant, of the Property or any portion thereof, may apply to DTSC for a termination of the Covenant as it applies to all or any portion of the Property owned or occupied by the applicant. Such application shall be made in accordance with Section 25234 of the California Health and Safety Code.

4.3 Amendment This Covenant may be amended from time to time in a writing signed by the Site Mitigation Branch Chief, DTSC, or his or her designee, and all of the then Owners of the Property, or any portion thereof, which remains subject to the Covenant. Any such amendment shall be effective only upon the date any such amendment is filed for recording in the official records of the County of Sonoma, State of California.

4.4 Term Unless otherwise terminated in accordance with Paragraph 4.2 above, by law or otherwise, this Covenant shall continue in effect in perpetuity.

## ARTICLE V

### MISCELLANEOUS

5.1 No Dedication Intended Nothing set forth herein shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property or any portion thereof to the general public or for any purposes whatsoever.

5.2 Notices Whenever any person shall desire to give or serve any notice, demand, or other communication with respect to this Covenant, each such notice, demand, or other communication shall be in writing and shall be deemed effective (i) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served or official of a government agency being served, or (ii) three (3) business days after deposit in the mail if mailed by United States mail, postage paid certified, return receipt requested. Any party, or subsequent Owner or Occupant of all or any part of the Property, may provide or change its address by notice to the other party in the manner set forth above in this paragraph. The following addresses shall be effective as of the effective date of this Covenant.

Covenantor: TBG, Inc.  
565 Fifth Avenue  
New York, New York 10017  
Attn: General Counsel

EPA: U.S. Environmental Protection Agency, Region IX  
75 Hawthorne St.  
San Francisco, CA 94105  
Attn: Office of Regional Counsel, Hazardous Waste Branch (RC-3)

DTSC: Department of Toxic Substances Control  
Region 2  
700 Heinz Avenue, Suite 200  
Berkeley, California 94710  
Attn: Chief, Site Mitigation Branch

5.3 Partial Invalidity If any portion of the Covenant is determined to be invalid for any reason, the remaining portion shall remain in full force and effect as if such portion had not been included herein.

5.4 Article Headings Headings at the beginning of each article of this Covenant are solely for the convenience of the parties and are not a part of the Covenant.

5.5 Recordation This instrument shall be executed by all Owners of the Property and by the Site Mitigation Branch Chief, California DTSC. This instrument shall be filed by the Covenantor for recording in the Official Records of the County of Sonoma, State of California within 10 days after the date Covenantor receives the instrument executed by DTSC. Covenantor shall provide DTSC a copy of the Covenant marked as received for recording by the County of Sonoma. Upon receipt of the Covenant marked as recorded, Covenantor shall provide a copy of such document to DTSC.

5.6 Effective Date This Covenant shall be executed by Covenantor and provided to DTSC for signature, and the Covenant shall then be effective upon execution by DTSC. DTSC shall provide the fully executed Covenant to Covenantor for recording pursuant to paragraph 2.1 hereof.

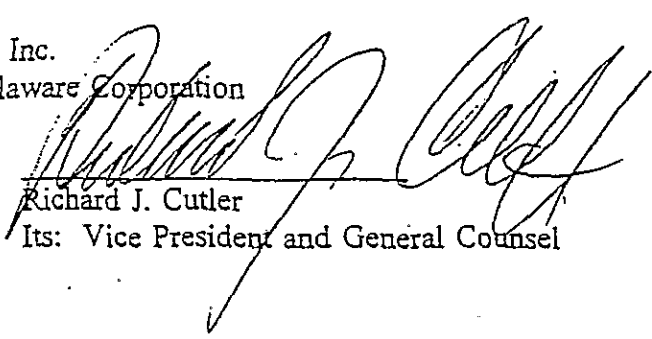
IN WITNESS WHEREOF, the parties execute this Covenant as of the date set forth below.

Date:

5-25-95

TBG, Inc.  
A Delaware Corporation

By:

  
Richard J. Cutler

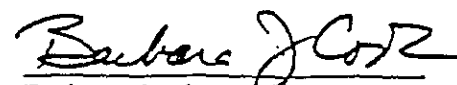
Its: Vice President and General Counsel

Date:

6/20/95

DEPARTMENT OF TOXIC SUBSTANCES CONTROL

By:

  
Barbara Cook

Chief, Site Mitigation Branch, Region 2

STATE OF CALIFORNIA )

COUNTY OF Alameda )

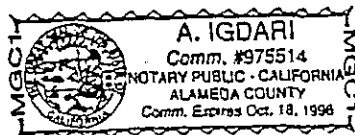
On June 20, 1995, before me, the undersigned, a Notary Public in and for said state, personally appeared Barbara Cook, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the Department of Toxic Substances Control executed the instrument.

WITNESS my hand and official seal.

Signature

A. Igdari

(Seal)



STATE OF New York )  
COUNTY OF New York )

On May 25, 1995, before me, the undersigned, a Notary Public in and for said state, personally appeared Richard J. Cutler, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument TBG, Inc., executed the instrument.

WITNESS my hand and official seal.

Signature

Virginia T. Fasano

(Seal)

VIRGINIA T. FASANO  
Notary Public, State of New York  
No. 60-4958738  
Qualified in Westchester County  
Certificate Filed in New York County  
Commission Expires November 13, 1995